Supreme Court, U.S.
FILED
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(4)

No. 99-1396

In The

Supreme Court of the United States

JAMES L. CHANDLER, et al.,

Appellants,

v.

KATHERINE HARRIS, in her official capacity as Secretary of the State of Florida, et al.,

Appellees.

On Appeal From United States District Court Southern District Of Florida

APPELLANTS' RESPONSE TO MOTIONS TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

The Appellants hereby address a number of points contained in the Statements of the Case made by the State Appellees and Intervenor Appellees with which they disagree:

Designation of Appellant(s)

The Intervenor Appellees identified to the Court an error in the notice of appeal. The caption of the notice lists the name of the first Appellant as "James L. Chandler" while the body of the notice lists the first Appellant as "James L. Moore." In fact, there is no party named James L. Moore in this litigation[1]. James L. Chandler is the correct lead Appellant and the error is solely typographical in nature.

The caption of the case in the district court was Thomas S. Fouts, et al. v. Katherine Harris etc., et al. Thomas S. Fouts was dismissed from the case as part of the settlement which dismissed the claims against the Florida State Senate districts. The caption in the notice of appeal was amended to reflect that James L. Chandler and others were taking an appeal from the district court ruling[2]. Mistakenly, the name "Moore" was inserted after

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[1] While there is no James L. Moore in this litigation, there was a James D. Moore who was dismissed from the suit upon the motion of the Plaintiffs on August 24, 1999 since he moved from the State of Florida after the commencement of the litigation.

[2] Changing the caption to reflect the names of the appellants is codified as Circuit Court of Appeal practice in Rule

the first name and initial "James L." instead of the name "Chandler". The affidavit of Michael Goldsberry, Esquire, the associate who typed the affidavit, attesting to the typographical error is reproduced in the Appendix to this response. The remaining Appellants to this proceeding were designated in the Notice of Appeal under the phrase "et al."[3]

Support for Settlement Agreement

The Intervenor Appellees' statement of the case asserts that the Florida Attorney General opposes the settlement reached between the Plaintiffs and the State of Florida. However, the Florida Attorney General is not a party to this litigation and therefor has neither standing to oppose nor to support the settlement [Intervenor Appellees' Motion, pages 4, 9, and 10 and footnote 8]. The

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3(c)(1)(A) of the Federal Rules of Appellate Procedure. The rule permits the names of the appellants to be named in the caption or body of the notice of appeal. There is no similar Supreme Court Rule permitting or prohibiting the same procedure.

[3] The Appellants admit to being unaware of this court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405 (1988) prior to the filing of the Notice of Appeal. Now that it has been brought to their attention, the question is raised whether this court's order of April 22, 1993, amending the Federal Rules of Appellate Procedure, and particularly Rule 3(c)(1)(A) regarding the "Contents of Notice of Appeal" to "reduce the amount of satellite litigation spawned by the Supreme Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988)" reflects an intent by this Court to permit additional parties to be contained under the designation "et al." in proceedings both before the Supreme Court and the Circuit Courts of Appeal, or solely in the Circuit Courts.

Florida Attorney General's office has provided legal services to the Governor and the Florida Secretary of State. However, the Attorney General, who holds an elected post in Florida's Cabinet, was not sued in this litigation and did not seek to intervene as a party. The opinions and positions stated by attorneys who work for the Attorney General have stated their positions in their representative capacities as counsel for the Governor and Secretary of State.

Time of Bringing District Court Action

The State Appellees assert that the "Appellant's presentation of subsequent events . . . obscures or misstates certain relevant facts and therefore warrants clarification." Specifically, the State Appellees argue that the Appellants assertion that they brought this action "less than 2 years after the enactment of the permanent redistricting plan" [Appellees' Motion, page 2] somehow misstates the facts. However, the Jurisdictional Statement sought to make clear that the United States District Court, Northern District of Florida enacted an **interim** redistricting plan which was in effect for the 1992, 1994, and 1996 election cycles. Thereafter, the Florida Legislature enacted a **permanent** redistricting plan under which elections were conducted in 1996 and 1998. The Appellants brought their action on April 2, 1998, less than 2 years after the enactment of the permanent (i.e. the legislative) redistricting plan[4].

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[4] The Appellants did not seek a preliminary injunction barring the 1998 elections in the gerrymandered districts because a similar motion in *Johnson v. Mortham* was denied.

The contours of the 17th, 18th, and 23rd congressional districts are the same under the permanent plan enacted by the Legislature as they were under the judicial interim plan. The legislative enactment of the replacement districting plan is an important event because it constitutes "state action" which was free from judicial compulsion. The passage of Chapter 96-192, Laws of Florida is the first action by the State of Florida implementing congressional districts in the State of Florida during the 1990's. The prior elections were held in districts which the State of Florida was required to adopt by order of the Northern District of Florida.

As Circuit Judge Hatchett stated in his dissent in *Johnson v. Mortham*, 915 F.Supp. 1529, 1559-60 (N.D. Fla. 1995) "the Plaintiffs have [not] pled sufficient 'state action' to support this Court's jurisdiction or to state a claim upon which relief can be granted. . . . In this case, the State of Florida bears no responsibility for the development and implementation of the 1992 redistricting plan. . . . " While the majority found that they had jurisdiction to reconsider the decision in DeGrandy because of a substantial change in the law, Judge Hatchett was correct that initial districts were the product of judicial action.

Pre-Clearance of Florida Congressional Districts Under Section 5

The State Appellees state that while Florida congressional districts 9, 11, 12, 13, 14, 16, 20, and 23 require Department of Justice pre-clearance under Section 5 of the Voting Rights Act of 1965, of those, only district 23 is challenged in this action [State Appellees' Motion, page 3

and footnote 1]. However, the Appellees have failed to point out to the court that District 16, 17, 20, and 23 share extensive common boundaries with each other making it impossible to alter the boundaries of one without altering the boundaries of the others, and thereby becoming subject to the preclearance requirements. The "ripple effect" caused by changing any district boundaries makes all South Florida congressional districts effectively subject to Department of Justice pre-clearance.

"Section 5 Benchmark" Argument was Raised before District Court

The State Appellees assert the Appellants never made the argument to the district court that their claim was not moot because "the Department of Justice will use the 1992 plan as a bench mark for the 2002 redistricting" [State Appellees Motion, page 6]. This is inaccurate. The Appellees, having no knowledge that the mootness argument was being considered by this Court in *Reno v. Bossier Parish School Board*, ___ U.S. ___, 120 S.Ct. 866 (2000), nevertheless extensively made the same argument in their Motion for Reconsideration[5]. The Appellants' argument to the District Court anticipated the Supreme Court ruling in *Reno v. Bossier Parish School Board*.

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[5] See section entitled "Continuing Importance of Finding of Unconstitutionality of Racially Gerrymandered Districts in South Florida" in Motion for Reconsideration, pages 10-12.

ARGUMENT

JAMES L. CHANDLER IS A PROPER APPELLANT. THE REMAINING APPELLANTS JOINED UNDER THE TERM "ET. AL." ARE EITHER APPELLANTS, OR APPELLEES SUPPORTING THE POSITION OF THE APPELLANT.

James L. Chandler was listed in the caption of the case as an appellant in the notice of appeal. The typographical error which resulted in his being called "James L. Moore" in the body of the notice of appeal does not change Mr. Chandler's standing as a appellant. It is objectively clear from the change in the caption of the case, from the fact that there was no party named "James L. Moore", from the fact that James D. Moore had been voluntarily dismissed from the suit, and from the fact that there is no other party having the first name and middle initial "James L." who appeared in the litigation, that James L. Chandler was appealing the ruling of the district court. As stated in the notes to subdivision (c) of the 1993 Amendments to the Federal Rules of Appellate Procedure, which dealt with the same issue:

> . . . the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Where, from the totality of the circumstances surrounding the naming of a party, it can objectively be determined who the proper party is, a misspelling of a name will not be considered material. *Faust v. U.S.*, 163

U.S. 452 (1896). A notice of appeal which lists the name of a party in the caption, rather than in the body, may be treated as the "functional equivalent" of the formal notice demanded by Rule 3. *Smith v. Barry*, 502 U.S. 244 (1992); *McAninch v. Traders Nat'l Bank*, 779 F.2d 466 (8th Cir. 1985) (intent to appeal an order was apparent from the procedural history of the case, [and] the caption on the notice of appeal).

With regard to the remaining Appellants, the problem is somewhat different. Appellants F. Evelyn McLean, Harvey E. Oyer, Jr., Cecile N. Demers, and Charles Bertheas were not separately identified in the notice of appeal but were instead included under the term "et al.". Under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the failure to separately list parties as appellants in a notice of appeal directed to a Circuit Court was jurisdictional in nature and barred the appeal of those appellants under the rules in effect prior to 1993. However, the Federal Rules of Appellate Procedure were amended by Congress in 1993 to eliminate the harsh result of the ruling in *Torres*. See Notes to subdivision (c) of the 1993 Amendments. Under the new Rule 3(c)(1) the appellants may describe the parties appealing using words like "et al." or "all plaintiffs."

Rule 18.1 of the Supreme Court Rules has not been amended to conform it with the procedure set forth in Rule 3(c)(1). However, had this Court, the Judicial Conference, or Congress considered the issue, it is likely that the same rule would have been adopted for Supreme Court proceedings as has been adopted for appeals to the Circuit Courts. The policy considerations which led to the restructuring of the Federal Rules of Appellate Procedure

to eliminate the result in *Torres* are as present in direct appeals to the Supreme Court as they were in appeals to the Circuit Courts.

Under Supreme Court Rule 18.2, a party who is omitted from the notice of appeal may proceed as an appellee supporting the position of the appellant. See *Moore's Federal Practice Section* 518.02[2][a]. If F. Evelyn McLean, Harvey E. Oyer, Jr., Cecile N. Demers, and Charles Bertheas are not deemed to be appellants, then they continue to have standing in this matter as appellees.

CONCLUSION

The order of the District Court should be reversed and the case remanded for further proceedings consistent with this Court's decision *Reno v. Bossier Parish School Board*, ___ U.S. ___, 120 S.Ct. 866 (2000).

Respectfully Submitted,

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APPENDIX I.

Affidavit of Michael Goldberry

1. I am an associate with the firm of Sullivan & Boyd and was assigned responsibility for preparing the Notice of Appeal filed in the District Court in this matter.

2. I personally typed the Notice of Appeal and listed James L. Chandler as the leading appellant in the caption of the case, adding the words "et.al." to reflect the additional appellants F. Evelyn McLean, Harvey E. Oyer, Jr., Cecile N. Demers, and Charles Bertheas.

3. I mistakenly typed the name "Moore" after the first name and middle initial "James L." in the body of the Notice of Appeal but had no intent of appealing in the name of James D. Moore, but only in the name of James L. Chandler.

I make the statements contained in the affidavit subject to the penalty of perjury under the laws of the United States on this 6th Day of April, 2000.

Original Signed